

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On February 4, 2015 appellant, then a 59-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained abrasions and scratches on both knees when she fell on a wet or icy surface. She stopped work on February 5, 2015. OWCP accepted the claim for bilateral knee contusions and a medial meniscal tear of the left knee.<sup>2</sup> On February 16, 2016 appellant underwent an OWCP-authorized partial medial meniscectomy of the left knee. She returned to modified employment on May 13, 2016. Appellant stopped work again on February 12, 2018 and subsequently resumed work with restrictions on August 13, 2018. On February 16, 2018 Dr. Crystel D. Knierim, a Board-certified orthopedic surgeon, performed an authorized left total knee arthroplasty.

In a report dated May 9, 2019, Dr. Knierim diagnosed status post left total knee arthroplasty with continued weakness. She found that appellant had reached maximum medical improvement (MMI).

On June 20, 2019 appellant filed a claim for a schedule award (Form CA-7).

In a July 3, 2019 development letter, OWCP requested that appellant submit a report from a physician addressing whether she had reached MMI and rating any employment-related permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*).<sup>3</sup>

On September 8, 2019 Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), advised that Dr. Knierim had provided insufficient information for him to perform an impairment rating. He recommended that OWCP refer appellant for a second opinion examination.

On October 3, 2019 OWCP referred appellant to Dr. Frank V. Thomas, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of any permanent impairment of the left lower extremity.

In a report dated October 24, 2019, Dr. Thomas discussed appellant's complaints of continued left knee pain and numbness along one side. He noted that x-rays showed a cemented total knee arthroplasty with a prosthesis in good position. On examination Dr. Thomas measured range of motion (ROM) as 0 to 120, 115, and 122 degrees on the left and found no laxity or effusion. He determined that appellant's knee was functional normally. Dr. Thomas diagnosed pain after a 2018 left total knee arthroplasty. Utilizing Table 16-3 on page 511 of the A.M.A., *Guides*, he identified the class of diagnosis (CDX) as a class 2 total knee arthroplasty, which yielded a default value of 25 percent. Dr. Thomas applied a grade modifier for functional history

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<sup>2</sup> By decision dated October 4, 2016, OWCP denied appellant's claim for compensation on June 8, 2016. By decision dated May 7, 2018, it denied her claim for wage-loss compensation from August 1 through 2, 2017, September 22, 2017, and January 15 to 17, 2017. By decision dated July 23, 2018, OWCP denied appellant's claim for wage-loss compensation from December 6 through 8, 2017, by decision dated February 27, 2019, it denied her claim for wage-loss compensation from December 3 through 6, 2018 and, by decision dated August 13, 2019, it denied her claim for wage-loss compensation from April 24 through 29, 2018.

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

(GMFH) of zero, a grade modifier for physical examination (GMPE) of zero, and a grade modifier for clinical studies (GMCS) of zero, which he found yielded 21 percent permanent impairment of the left lower extremity.

On May 5, 2020 Dr. Orenstein concurred with Dr. Thomas' finding of a class 2 total knee arthroplasty, using Table 16-3 of the A.M.A., *Guides*, for a default impairment rating of 25 percent. He found a GMFH of zero based on appellant's normal gait, a GMPE of zero for no consistent examination findings, and found that a GMCS was inapplicable as it was used to determine the CDX. Dr. Orenstein applied the net adjustment formula, which yielded a 21 percent permanent impairment of the left lower extremity. He found that appellant had reached MMI on October 24, 2019.

By decision dated May 7, 2020, OWCP granted appellant a schedule award for 21 percent permanent impairment of the left lower extremity (knee). The period of the award ran for 60.48 weeks from October 24, 2019 to December 20, 2020.

On an appeal request form signed and dated July 30, 2020, received by OWCP on August 17, 2020, appellant requested a review of the written record before a representative of OWCP's Branch of Hearing and Review. She submitted two partial pages from a medical report. There was no evidence of an envelope with an accompanying postmark.

By decision dated September 8, 2020, OWCP denied appellant's request for a review of the written record as untimely filed. It determined that she was not entitled to a review of the written record as a matter of right under section 8124(b) because her request was dated more than 30 days after it had issued its May 7, 2020 decision. OWCP considered whether to grant a discretionary hearing/review of the written record and determined that the matter could equally well be addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA,<sup>4</sup> and its implementing federal regulation,<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.<sup>6</sup> The Board has approved the use by OWCP of the A.M.A.,

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

*Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>7</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).<sup>8</sup> Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.<sup>9</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>10</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has no greater than 21 percent permanent impairment of the left lower extremity (knee) for which she received a schedule award.

On May 9, 2019 Dr. Knierim found that appellant was status-post left TKA with continued weakness. She did not, however, provide an impairment rating and, thus, her report is insufficient to establish entitlement to a schedule award.<sup>12</sup>

OWCP referred appellant to Dr. Thomas for an impairment evaluation. In a report dated October 24, 2019, Dr. Thomas found that x-rays showed a cemented total knee arthroplasty with a prosthesis in good position. On examination he measured ROM of 0 to 120, 115, and 122 degrees on the left. Dr. Thomas opined that appellant's knee was functioning normally with no laxity or effusion. Dr. Thomas diagnosed pain after a 2018 left total knee arthroplasty. He identified the CDX as a class 2 total knee replacement, applicable to results with good position, stability, and functionality, according to Table 16-3 on page 511. Dr. Thomas found that the GMFH, GMPE, and GMCS were all zero, which he indicated moved the default impairment value of 25 percent two places to the left, for 21 percent permanent impairment under Table 16-3 on page 511 of the A.M.A., *Guides*.

On May 5, 2020 Dr. Orenstein reviewed Dr. Thomas' findings and concurred that the applicable CDX was a class 2 total knee arthroplasty, with a default value of 25 percent. He found a GMFH of zero based on appellant's normal gait, a GMPE of zero due to the lack of consistent examination findings, and found a GMCS was inapplicable as it was used to determine the CDX. Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (0-2) + (0-2), yielded an adjustment of two places to the left, or 21 percent impairment

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<sup>7</sup> P.R., Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>8</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>9</sup> *Id.* at 494-531.

<sup>10</sup> *Id.* 411.

<sup>11</sup> R.R., Docket No. 17-1947 (issued December 19, 2018); R.V., Docket No. 10-1827 (issued April 1, 2011).

<sup>12</sup> J.C., Docket No. 20-1071 (issued January 4, 2021); T.D., Docket No. 17-1495 (issued January 4, 2018).

of the left lower extremity. The Board has reviewed the clinical findings and report of Dr. Thomas and Dr. Orenstein's opinion and finds that they conform to the provisions of the A.M.A., *Guides*. They properly reviewed the medical evidence and evaluated appellant's impairment of the lower extremities in accordance with the A.M.A., *Guides*.<sup>13</sup> There is no medical evidence in conformance with the A.M.A., *Guides* showing a greater impairment.<sup>14</sup>

On appeal appellant asserted that OWCP failed to consider that one of her legs was shorter than the other and that she walked with a limp, and that Dr. Thomas had advised her to wear her insoles. She has the burden of proof, however, to submit medical evidence utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of impairment of the left lower extremity. Appellant has not submitted such evidence and, thus, has not met her burden of proof to show greater permanent impairment.<sup>15</sup>

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary."<sup>16</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>17</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by the postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>18</sup> Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>13</sup> See *A.C.*, Docket No. 18-1306 (issued October 18, 2019); *F.K.*, Docket No. 18-1700 (issued May 9, 2019).

<sup>14</sup> See *L.D.*, Docket No 19-0495 (issued February 5, 2020).

<sup>15</sup> See *S.C.*, Docket No. 20-0769 (issued January 12, 2021); *R.A.*, Docket No. 19-1798 (issued November 4, 2020).

<sup>16</sup> 5 U.S.C. § 8124(b)(1).

<sup>17</sup> 20 C.F.R. §§ 10.615, 10.617, 10.618.

<sup>18</sup> *Id.* at § 10.616(a).

<sup>19</sup> See *O.R.*, Docket No. 20-0743 (issued January 28, 2021).

OWCP's regulations provide that the hearing request must be sent within 30 days of the date of the decision for which a hearing/review of the written record is sought as determined by the postmark date or other carrier's marking showing when the request was sent to OWCP.<sup>20</sup> On August 17, 2020 OWCP received appellant's July 30, 2020 request for a review of the written record. As her request was signed and dated July 30, 2020, more than 30 days after OWCP's May 8, 2020 merit decision, it was untimely filed.<sup>21</sup> Therefore, OWCP properly denied appellant's request for review of the written record as a matter of right.<sup>22</sup>

OWCP has the discretionary power to grant a review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its September 8, 2020 nonmerit decision, properly exercised its discretion by indicating that it had considered the matter and had denied appellant's request for a review of the written record because her claim could be equally well addressed through a reconsideration application. Because reconsideration exists as an alternative appeal right to address the issue raised by OWCP's May 7, 2020 decision, the Board finds that OWCP has not abused its discretion in denying appellant's untimely request for a review of the written record.<sup>23</sup>

### **CONCLUSION**

The Board finds that appellant has no greater than 21 percent permanent impairment of the left lower extremity (knee) for which she received a schedule award. The Board further finds that OWCP properly denied her request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>20</sup> See *supra* note 18.

<sup>21</sup> See generally *D.R.*, Docket No. 19-1885 (issued April 24, 2020); *G.S.*, Docket No. 18-0388 (issued July 19, 2018).

<sup>22</sup> *S.A.*, Docket No. 19-0613 (issued August 22, 2019).

<sup>23</sup> See *J.N.*, Docket No. 18-0646 (issued January 28, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8 and May 7, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 20, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board